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Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of	)	
Distribution of the 2014-17 Satellite Funds	)	**Docket No. 16-CRB-0010-SD (2014-17)**

PROGRAM SUPPLIERS' RESPONSIVE BRIEF REGARDING PROPOSED CLAIMANT GROUP DEFINITIONS

Pursuant to the Copyright Royalty Judges' ("Judges") *Notice Of Participants And Order For Preliminary Action To Address Categories Of Claims* (March 20, 2019) ("Notice"), the Motion Picture Association of America, Inc. ("MPAA"), its member companies and other producers and distributors of syndicated series, movies, specials, and non-live-team sports broadcast by television stations and retransmitted by satellite systems who have agreed to representation by MPAA ("Program Suppliers"), hereby submit their responsive brief regarding proposed claimant category definitions for the Allocation Phase of this proceeding ("Claimant Group Definitions").

Program Suppliers' responsive brief addresses three issues. *First*, contrary to the Joint Comments, it is necessary and timely to modify and clarify the Claimant Group Definitions utilized in Allocation Phase proceedings.[1] As Program Suppliers explained in their initial brief,

[1] Joint comments were filed by the Joint Sports Claimants ("JSC"); Broadcaster Claimants Group ("BCG"); Broadcast Music, Inc., American Society of Composers, Authors, and Publishers ("ASCAP") and SESAC Performing Rights LLC ("SESAC") (collectively, "Music Claimants"); and Settling Devotional Claimants ("SDC"). *See* Joint Comments Of 2014-17 Satellite Participants On Allocation Phase Claimant Category Definitions at 1-6 ("Joint Comments").

clarifications to the Claimant Group Definitions adopted in the 2010-13 Cable and 2010-13 Satellite Allocation Phase Proceedings are clearly warranted because confusion over the correct treatment of non-JSC sports programming was a significant issue in the 2010-13 Cable Allocation Phase Proceeding. *See* PS Initial Brief at 7-8, and n.10. The Judges should not perpetuate such confusion in future proceedings, but rather should remedy it by clarifying the Claimant Group Definitions as Program Suppliers have proposed. Program Suppliers also support clarifications to update the Claimant Group Definitions, including removing references to programs that no longer air on television.

Second, Multigroup Claimants' ("MGC") proposal to adopt a new, generic Allocation Phase definition of "sports" programming that would encompass all sports-related programming (*i.e.*, both JSC sports programming and non-JSC sports programming) has merit. However, adoption of such a catch-all, generic definition of "sports" would create significant Distribution Phase controversies between MPAA, JSC, and other parties in the new "sports" program category, which have not existed in recent royalty distribution proceedings before the Judges, and which will likely need to be resolved through Distribution Phase litigation.[2]

Finally, Program Suppliers restate that whatever Allocation Phase definitions the Judges choose to adopt (whether based on Claimant Groups or Program Types) *must* be limited to eligible claimants and the eligible works associated with their claims. Program Suppliers address each of these issues in turn below.

[2] Program Suppliers hereby provide notice to the Judges and the parties that should a generic "sports" program category be adopted by the Judges in this proceeding, as MGC has proposed, MPAA will have Distribution Phase controversies in the new "sports" category with JSC, MGC, and any other participant not represented by MPAA who asserts an entitlement to a share of "sports" royalties in these proceedings.

ARGUMENT

I. Program Suppliers' Proposed Clarifications To The Claimant Group Definitions Are Appropriate.

The Joint Comments incorrectly suggest that the category definitions adopted in the 2010-13 Cable and 2010-13 Satellite Allocation Phase Proceedings should be seen as set in stone, and never subject to clarification or modification.[3] But this position simply defies logic. As the Judges have repeatedly recognized, every royalty distribution proceeding is a separate docket, involving different claimants, different claimed works, and different participating parties.[4] Accordingly, if the Judges intend to continue dividing royalty distribution proceedings into separate Allocation and Distribution phases, the Judges must adopt Allocation Phase Claimant Group Definitions at the outset of each proceeding that fairly reflect the claims of the particular participants before them. The Judges should also endeavor to adopt Allocation Phase Claimant Group Definitions that employ contemporary descriptive language (as opposed to outdated language and/or program references) that is clearly understood by all participants and the Judges. Unfortunately, the 2010-13 Cable and 2010-13 Satellite Allocation Phase Claimant Group Definitions did not meet this standard.

The Program Suppliers Claimant Group has *always* included a significant quantity of non-live-team sports (also referred to as non-JSC sports) programming and corresponding substantial value. *See* PS Initial Brief at 7-8. Attempting to cast aspersions on Program Suppliers' claims, the Joint Commenters incorrectly refer to non-JSC or "Other Sports" as an "entirely new category."

[3] The Joint Comments seem to suggest that the existing Claimant Group Definitions should be treated as if they have some sort of legal or precedential authority in royalty distribution proceedings. *See* Joint Comments at 1-3. However, as MGC correctly points out, those Claimant Group Definitions were not developed by the Judges, and are not set forth in either the Copyright Act or the Judges' regulations. *See* MGC Comments at 3-5 and Exhibit A.

[4] By way of example, the list of participants in this proceeding includes parties that did not appear in the 2010-13 Satellite Allocation Phase Proceeding. *See* Notice at Exhibit A.

Joint Comments at 2, n.2. But this is inaccurate. "Other Sports" (or "non-live-team sports"), are (and have always been) a type of programming represented primarily by claimants in the Program Suppliers Claimant Group similar to "movies," "syndicated series," or "specials," all distinct Program Types typically claimed by the same group. However, the nature of "Other Sports" programming lends it to be very easily confused with JSC sports programming, especially in the context of operator surveys.[5] In addition, there has been a significant disconnect between the Judges' Claimant Group Definitions and the cable operator survey evidence presented by the parties in Allocation Phase proceedings (which has focused on value allocations among different Program Types, rather than among Claimant Groups).[6] Consequently, the need exists for modification and clarification of the definitional language.

If the Judges intend to continue the longstanding practice of adopting Claimant Group Definitions for the Allocation Phase of this proceeding,[7] Program Suppliers' proposed

[5] In the 2010-13 Cable Allocation Phase Proceeding, multiple witnesses testified that the Joint Sports Claimants Claimant Group Definition was confusing to cable operators. *See* Written Direct Testimony of Howard Horowitz at 3, Ex. 6012, Docket No. 14-CRB-0010-CD; Written Rebuttal Testimony of Howard Horowitz at 4, 10, Ex. 6013, Docket No. 14-CRB-0010-CD; Written Direct Testimony of Sue Ann R. Hamilton at 10-12, Ex. 6008, Docket No. 14-CRB-0010-CD; Written Rebuttal Testimony of Sue Ann R. Hamilton at 6-9, Ex. 6009, Docket No. 14-CRB-0010-CD.

[6] For example, in the 2010-13 Cable Proceeding, the Judges adopted "Agreed Categories of Claimants," *see* Notice Of Participant Groups, Commencement Of Voluntary Negotiation Period (Allocation) and Scheduling Order, Docket No. 14-CRB-0010-CD at Exhibit A (November 25, 2015), but the parties' survey evidence sought to have cable operators allocate value among "program categories" by describing the different types of programming retransmitted on distant signals actually carried by their systems. *See, e.g.*, 2010-13 Bortz Report at 17, Ex. 1001, Docket No. 14-CRB-0010-CD (recognizing that respondents were asked "to allocate a percentage of a finite dollar amount to each of the program categories on the distant signals that the system retransmitted"); Written Direct Testimony of Howard Horowitz at 14, Ex. 6012, Docket No. 14-CRB-0010-CD (describing the "payoff question" in the Horowitz Survey as asking the respondent to "consider the value of each type of programming (i.e., identified program categories) to their system"). This disconnect between the Claimant Group Definitions and the evidence generates substantial confusion. *See* PS Initial Brief at 8, n.10.

[7] As certain of the Joint Commenters explained in an *amicus* brief several years ago, the Allocation Phase categories have been based on defined *categories of claimants*, or Claimant Groups, since the inception of the cable statutory license. *See* Joint Brief of Amici Curiae Commercial Television Claimants, PTV, Music Claimants, Canadian Claimants Group, and National Public Radio In Support Of Appellees, D.C. Cir. No. 13-1274, et al., at 7-16 (filed August 18, 2014).

clarifications should be adopted. Those clarifications more completely reflect all the different Program Types present in the Program Suppliers Claimant Group, while also updating their language to remove dated program examples. Program Suppliers urge the Judges to adopt their proposed clarifications to the Claimant Group Definitions for this proceeding.

II. MGC's Generic "Sports" Category Definition Would Create Significant Distribution Phase Controversies.

There is some merit to MGC's proposal that the Judges eliminate the Joint Sports Claimants Allocation Phase category and replace it with a generic "Sports" Allocation Phase category that would be defined as "programming of a predominately sports nature." MGC Comments at 15-16. Indeed, as explained above, the Joint Sports Claimants Claimant Group Definition as it currently exists is confusing because cable and satellite operators do not routinely make distinctions between JSC sports programming and all other sports and sport-related programming when making programming decisions for their systems.[8] Therefore, adopting a catch-all "sports" category, as MGC suggests, would alleviate the confusion that abounds regarding the value of JSC versus non-JSC claimed sports programming in the Allocation Phase.

MGC's proposed approach, however, would defer all controversies regarding valuation of sports-related programming to the Distribution Phase of this proceeding. Such a deferral would have far-reaching consequences, creating significant Distribution Phase controversies between JSC, MPAA, and other parties in the new "sports" category, as described *supra*,[9] which have not existed in recent royalty distribution proceedings before the Judges. Currently, the definition of program types falling within the Joint Sports Claimants Claimant Group (*i.e.*, "live telecasts of

[8] *See, e.g.*, Written Direct Testimony of Sue Ann R. Hamilton at 10-12, Ex. 6008, Docket No. 14-CRB-0010-CD; Written Rebuttal Testimony of Sue Ann R. Hamilton at 6-9, Ex. 6009, Docket No. 14-CRB-0010-CD.

[9] *See* note 2, *supra*.

professional and college team sports") is so limiting as to encompass only programming of the major sports leagues (such as NBA, NFL, MLB and NHL) to the exclusion of all other sports and sports-related programming. As a result, Distribution Phase proceedings have often not been needed concerning the Joint Sports Claimants Claimant Group in recent years (other than to resolve claims-related issues) because those leagues have acted in concert under the JSC umbrella.[10] If adopted, MGC's proposal would change this. Assuming no settlements are reached, MPAA will have Distribution Phase controversies not only in the Program Suppliers category, but also additional ones in the new "Sports" category.[11] While MGC's proposal may provide a clearer mechanism for the Judges to resolve confusion regarding the correct allocation of royalties related to "sports" programming, it would also likely impose significant Distribution Phase litigation expenses on certain participants. Thus, MPAA and its represented Program Suppliers claimants respectfully ask the Judges to carefully consider the implications of their decision in evaluating MGC's proposal.

III. Regardless Of Whether Allocation Phase Definitions Are Based On Claimant Group Or Program Type, They Must Be Limited To Eligible Claims And Works.

As Program Suppliers explained in their initial brief, if the Judges intend to adopt some sort of Allocation Phase category definitions for this proceeding,[12] it is essential that the scope and

[10] While recent Distribution Phase proceedings related to the Joint Sports Claimants Claimant Group have been resolved prior to methodology hearings, historically, there have been Distribution Phase controversies litigated to a conclusion in that category. *See, e.g.*, 49 Fed. Reg. 37653, 37656-57 (September 25, 1984) (awarding 0.02% of sports royalties to Spanish International Network ("SIN"), and the balance to JSC).

[11] For purposes of this brief, Program Suppliers assume that the Judges would retain the remainder of the Program Suppliers Claimant Group Definition if the Judges were to adopt MGC's proposal regarding the "Sports" category. However, if the Judges instead decide to adopt separate Allocation Phase categories in this proceeding for movies, syndicated series, and specials (*i.e.*, by adopting categories based on Program Type instead of Claimant Group), then MPAA would have a Distribution Phase controversy as to each of these categories.

[12] As the Judges have recognized, there is no statutory requirement that the Judges continue separating royalty distribution proceedings into Allocation and Distribution Phases. *See, e.g.*, Amended Notice Of Participant Groups, Commencement Of Voluntary Negotiation Period (Allocation) and Scheduling Order, Docket No. 14-CRB-0011-SD

language of those definitions be clearly defined. Regardless of whether the Judges choose to adopt Claimant Group Definitions or Program Type Definitions for this proceeding, the Copyright Act mandates that the Allocation Phase categories adopted be limited to eligible claimants and their associated eligible works. *See* PS Initial Brief at 3-7. Program Suppliers therefore urge the Judges to make it clear that the Allocation Phase definitions adopted for this proceeding are limited to eligible works and expressly exclude unclaimed works. *See id.* at 5-6. The Judges should also clarify that inter-category Allocation Phase discovery will be permitted so that opposing parties are provided an opportunity to test whether the Allocation Phase methodologies presented accurately apply the category definitions and comply with this statutorily-prescribed eligibility limitation. *See id.* at 6-7.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Program Suppliers' initial brief, Program Suppliers' proposals regarding the scope and language of Claimant Group Definitions should be adopted by the Judges for this proceeding.

at 3 (December 1, 2015). If the Judges were to decide to eliminate the Allocation Phase altogether, the Judges would be able to avoid adopting category definitions and could instead focus on the allocation of royalties among eligible copyright owners of eligible works, which is set forth in the Copyright Act. *See* 17 U.S.C. § 119(b)(4)-(5).

Respectfully submitted,

/s/ Gregory O. Olaniran

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
Leo M. Lichtman
D.C. Bar No. 1026600
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street NW, 7th Floor
Washington, D.C. 20036
Telephone: (202) 355-7917
Facsimile: (202) 355-7887
goo@msk.com
lhp@msk.com
amd@msk.com
lml@msk.com

Dated: May 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2019, a copy of the foregoing pleading was provided to each of the parties on the attached service list, either electronically via the Copyright Royalty Judges' eCRB electronic filing system, or, for those parties not receiving service through eCRB, by Federal Express overnight mail.

/s/ *Lucy Holmes Plovnick*
Lucy Holmes Plovnick

SERVICE LIST

JOINT SPORTS CLAIMANTS

Daniel Cantor
Michael Kientzle
Bryan L. Adkins
ARNOLD & PORTER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Philip R. Hochberg
LAW OFFICES OF PHILIP R. HOCHBERG
12505 Park Potomac Ave., Suite 600
Potomac, MD 20854

SETTLING DEVOTIONAL CLAIMANTS

Matthew J. MacLean
Michael A. Warley
Jessica T. Nyman
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036

Arnold P. Lutzker
Benjamin Sternberg
LUTZKER & LUTZKER LLP
1233 20th Street, NW
Suite 703
Washington, DC 20036

BROADCASTER CLAIMANTS GROUP

John I. Stewart, Jr.
Ann Mace
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Samuel Mosenkis
ASCAP
One Lincoln Plaza
1900 Broadway
New York, NY 10023

BROADCAST MUSIC, INC.

Joseph J. DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030

Brian Coleman
Jennifer T. Criss
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005

SESAC, INC.

John C. Beiter
LEAVENS, STRAND & GLOVER LLC
1102 17th Avenue South
Suite 306
Nashville, TN 37212

Christos P. Badavas
152 West 57th Street, 57th Floor
New York, NY 10019

GLOBAL MUSIC RIGHTS, LLC

Scott A. Zebrak
Steven Surachman
OPPENHEIM+ ZEBRAK, LLP
4530 Wisconsin Avenue, NW, 5th Floor
Washington, DC 20015

MULTIGROUP CLAIMANTS

Brian D. Boydston
PICK & BOYDSTON LLP
2288 Westwood Blvd., Ste. 212
Los Angeles, CA 90064

MAJOR LEAGUE SOCCER

Edward S. Hammerman
HAMMERMAN PLLC
5335 Wisconsin Ave., Suite 440
Washington, DC 20015-2054

CIRCLE OF GOD NETWORK, INC.

David Powell
P.O. Box 010950
Miami, FL 33101

Proof of Delivery

I hereby certify that on Friday, May 03, 2019 I provided a true and correct copy of the Program Suppliers' Responsive Brief Regarding Proposed Claimant Group Definitions to the following:

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

Broadcast Music, Inc., represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

Broadcaster Claimants Group, represented by John Stewart served via Electronic Service at jstewart@crowell.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Global Music Rights, LLC, represented by Scott A Zebrak served via Electronic Service at scott@oandzlaw.com

SESAC Performing Rights, LLC, represented by John C. Beiter served via Electronic Service at john@beiterlaw.com

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

circle god network inc d/b/a david powell, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

Signed: /s/ Lucy H Plovnick